

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DAMIQUE FENNELL, :

Petitioner, :

-against- :

MEMORANDUM AND ORDER

TIMOTHY MCCARTHY, Superintendent :
of Auburn Correctional Facility, :

20-CV-3764 (GHW) (KNF)

Respondent. :

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KEVIN NATHANIEL FOX
UNITED STATES MAGISTRATE JUDGE

By a letter-motion dated February 9, 2021, the respondent contends that he mailed to the petitioner a copy of the answer and the state court record. Inexplicably, however, respondent: (1) failed to file via ECF respondent's answer or the State Court Record; (2) failed to request of the Court an order sealing the State Court Record, which Record repeatedly references the victim's name; and (3) disclosed the victim's name in its memorandum of law that was filed, unsealed, via ECF (Dkt. No. 14).

The respondent requests an order:

(1) pursuant to Fed.R.Civ.P. 5.2(d) granting respondent permission to file under seal the State Court Record and state-court transcripts in this case on February 15, 2021; and (2) striking from the record the memorandum of law that respondent previously filed in this case (Dkt. No. 14), while granting respondent permission to file an amended memorandum of law identical in all respects other than omitting any mention of the victim's name.

According to the respondent, filing under seal is warranted because

Under New York Civil Rights Law § 50-b, the "identity of any victim of a sex offense . . . shall be confidential," and as such, "[n]o report, paper, picture, photograph, court file or other documents, in the custody or possession of any public officer or employee, which identifies such a victim shall be made available for public inspection." N.Y. Civil Rights Law § 50-b. The victim's name appears

hundreds of times throughout the state-court documents, including in the state-court briefs and relevant transcripts. . . . Given that the memorandum of law and answer will omit the victim's name, there is no need to seal these documents.

Although the Court does not condone the respondent's lack of diligence and inexplicable failure to comply with the May 19, 2020 order, in view of the "strong 'preference for resolving disputes on the merits'" in this circuit, New York v. Green, 420 F.3d 99, 104 (2d Cir. 2005), the Court:


- (1) grants the respondent's request to strike entirely from the record the respondent's memorandum of law filed on September 21, 2020, Docket Entry No. 14;
- (2) grants the respondent's request to serve and file, on or before February 15, 2021, his properly redacted answer and amended memorandum of law identical in content to that filed on September 21, 2020, with appropriate redactions; and
- (3) denies the respondent's request to file under seal the state court record and transcripts, without prejudice to renewal that must comply with Section 6 of this court's Electronic Case Filing Rules and Instructions, including Section 6.5(a) requiring the movant to "identify the Viewing Level to be applied to the proposed sealed document."

The Clerk of Court is directed to strike entirely from the record Docket Entry No. 14.

The Clerk of Court is directed to mail a copy of this Order to the petitioner.

Dated: New York, New York
February 11, 2021

SO ORDERED:



KEVIN NATHANIEL FOX
UNITED STATES MAGISTRATE JUDGE